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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 186

FRANCISCO DE LA TORRE,
Petitioner,

v.

THE NATIONAL CITY BANK OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

June 20, 1940.

LUIS LLORENS TORRES,
LUIS MUÑOZ MORALES, and
HENRY G. MOLINA,
Counsel for Petitioner.

Appeal Printing Co., Inc., 130 Cedar St., New York

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SUPREME COURT OF THE UNITED STATES

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THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Francisco de la Torre, respectfully shows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment entered on March 29, 1940, affirming a judgment of the Supreme Court of Puerto Rico which dismissed the original petition of this petitioner addressed to the District Court of San Juan for an order to set aside the attachment that had been levied at the instance of the plaintiff-appellee, The National City Bank of New York, on real property, two houses and a mortgage credit, belonging to the conjugal partnership composed of the appellant and his wife, Carmen Fernández Saldaña, to secure the effectiveness of the judgment sought by said bank against the appellant and his cousin, Mercedes de la Torre, and her husband, Arturo O'Neill for the amount of a cer-

tain note, $10,398.38, with interest thereon at 9% per annum from October 12, 1929, together with the costs of the suit.

The mandate of the Circuit Court of Appeals has been recalled to that court pending action on this petition.

I

Statement of the matter involved

The facts are succinctly stated in the opinion of the Supreme Court (R. 6) as follows:

> Mercedes de la Torre Berríos applied to the American Colonial Bank of Porto Rico for a loan for $10,398.38. The bank demanded certain collateral securities in addition to the mortgage offered by the applicant. As a substitute for the collateral securities Francisco de la Torre Carrido, petitioner, agreed to become also responsible for the amount of the loan, with the stipulated interest thereon plus costs and attorney's fees in case of judicial recovery. This accommodation on the part of de la Torre was given without compensation or without any valuable consideration or promise of gain. As agreed upon, Mercedes de la Torre and Francisco de la Torre subscribed, on May 20, 1929, a promissory note, a mortgage to secure the same being executed upon property belonging to the former and subscribed also by the latter as maker thereof, for the purposes previously stated. Mercedes de la Torre received the full amount of the loan, and at the same time or immediately thereafter she delivered the note to the creditor bank in payment of certain obligations from her to the already matured.
>
> It is immaterial to specify whether Francisco de la Torre subscribed the promissory note and the mortgage as a surety *in solidum* or as principal

debtor. It will be sufficient to state, for the purpose of this opinion, that the loan was not made either for his benefit separately or for that of the conjugal partnership existing since 1906 between himself and his wife, it being necessary to state further that the latter did not have any knowledge of, nor did she ratify, the deal made by her husband. It is a fact, however, admitted by De la Torre, that he assumed the obligation to pay the loan in question.

Some time after the carrying out of this deal, The National City Bank of New York took over all the assets and liabilities of The American Colonial Bank of Porto Rico and in this way the aforesaid credit became the property of the plaintiff bank.

Upon the failure to pay the loan at maturity the plaintiff took the proper action for its collection, and to secure the judgment to be rendered and irrespective of the property mortgaged it attached property belonging to the conjugal partnership between De la Torre and his wife, Carmen Fernández Saldaña, notwithstanding the allegation of this defendant that he owns separate property liable to be attached for that purpose.

In opposition to the above steps taken by the plaintiff, De la Torre, in a separate record and as an incident of the attachment, filed a motion in the District Court of San Juan, in which after reciting the facts above set out, not controverted by the plaintiff, prayed that after hearing the parties the nullity and dissolution of the attachment be decreed.

The ground for his motion is that, as no obligation or debt of the conjugal partnership is involved, no property belonging to said partnership should be attached for the payment of the obligation sued on.

After a hearing the district court made an order denying the motion of De la Torre, from which the present appeal was taken.

II

Reasons relied upon for the allowance of the writ

The grounds upon which petitioner prays that this matter should be reviewed are:

(1) That the Circuit Court of Appeals has interpreted the decisions of this honorable Court in *Bonet* v. *The Texas Co.*, 84 L. Ed. 292, and *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505, 83 L. Ed. 946, as virtually derogating or repealing the Act of Congress which provides (28 USCA, Sec. 225):

> Sec. 225. (Judicial Code, section 128, amended.) Appellate Jurisdiction.—(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions— * * * Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interests and costs, exceeds $5,000, and in all habeas corpus proceedings;

that this Honorable Court, with all due and humble respect, has no power or right under the Constitution to repeal an Act of the Congress and, in this instance, to deprive petitioner of his clear and manifest right to appeal from a judgment of the Supreme Court of Puerto Rico in a case involving more than $5,000, and to have that appeal sustained and the judgment of the Supreme Court of Puerto Rico reversed if the Honorable Circuit Court of Appeals in the careful and well-considered opinion or opinions of its three judges believe that the judgment appealed from is erroneous.

(2) That the Supreme Court of Puerto Rico committed *manifest* error in holding that in accordance with the laws of Puerto Rico community property can be attached and sold to satisfy a gratuitous obligation incurred by the husband (accommodation endorsement of a note) without the consent of the wife and without the community deriving any benefit whatsoever from the transaction.

There is presented herewith as part of this petition a certified transcript of the record before the Circuit Court of Appeals but there is no issue as to the facts so that record is useful only for the opinion of the Puerto Rican Supreme Court which appears on pages 6 to 16 thereof.

Wherefore petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in this cause, to the end that said cause may be reviewed and determined by this Court as provided by law, and that the judgment of said Circuit Court of Appeals in this cause may be reversed by this Court, and the mandate thereof recalled and revised, and that petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And petitioner will ever pray.

Luis Llorens Torres,
Luis Muñoz Morales, and
Henry G. Molina,
Solicitors for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

June 20, 1940.

HENRY G. MOLINA,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

FRANCISCO DE LA TORRE,

Petitioner,

v.

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This is an application for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the First Circuit.

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is reported at 110 Fed. (2nd) 976. It appears at page 41 of the record. The opinion of the Supreme Court of Puerto Rico is reported in 54 DPR 233; it appears at pages 6 to 16 of the record.

Jurisdiction of the Court

This proceeding originated in the District Court of San Juan, Puerto Rico, by a petition of the present petitioner in the case of the respondent against him for the collection of a certain note signed by petitioner for a loan that "was not made either for his benefit separately or for that of

the conjugal partnership existing since 1906 between himself and his wife," (Opinion Supreme Court, R. 6, *supra* p. 3). The petition asked the court to set aside certain attachments that had been levied upon real (immovable) property of the conjugal partnership to secure the effectiveness of the judgment sought by plaintiff-respondent here.

The District Court denied that petition (R. 1) and on appeal to the Supreme Court of Puerto Rico, that judgment was affirmed (R. 16). An appeal was then taken to the United States Circuit Court of Appeals for the First Circuit in accordance with the right conferred by the Act of Congress aforesaid (*supra* p. 4). That Court in an able opinion by Mr. Circuit Judge Magruder demonstrated that the decision appealed from was clearly erroneous and accordingly it would have reversed the judgment had it not been for its interpretation of certain recent decisions of this Honorable Court in consequence whereof it held:

> But we may not reverse a judgment of the Supreme Court of Puerto Rico on a matter of local law unless that judgment is "inescapably wrong". Bonet *v.* The Texas Co., 84 L. ed. 292; Bonet *v.* Yabucoa Sugar Co., 306 U. S. 505; Diaz v. Gonzalez, 261 U. S. 102, 105.

Certiorari is asked for, pursuant to Section 240(a) of the Judicial Code, within three months after judgment of affirmance (R. p. 66).

Statement of the Matter Involved

The question at issue is so simple that any further statement thereof would merely be a repetition of what has already been said in this brief and in the foregoing petition.

ARGUMENT

POINT I

The Supreme Court of Puerto Rico committed manifest error in holding that community property is liable for a gratuitous obligation contracted by the husband without the consent of his wife and without any benefit whatsoever to the community.

The decision of the Supreme Court of Puerto Rico is:

(1) Contrary to the obvious intention of the radical changes made in the Civil Code of Spain by the Legislature of Puerto Rico in the year 1902, that is, when they adopted the so-called "Revised" or "Puerto Rican" Civil Code, actually the same Spanish Code with a very few changes especially those hereafter mentioned concerning the rights of women in and to their own property and community;

(2) Contrary to the opinions of the authoritative commentators even on the Civil Code of Spain without those changes made expressly in the Puerto Rican revision to protect the wife's interest in all property and make her more independent than the Spanish spouse;

(3) Contrary to the well-reasoned opinion of the Supreme Court of two States of our Union, Washington and Arizona, under statutes similar to that of Puerto Rico.

The decision purports to be based upon the commentaries of Manresa and of Scaevola (R. 10 and 11), which hold quite to the contrary; upon a short quotation from Llerena (R. 12), a commentator on the Civil Code of the Argentine which is quite different than that of Puerto Rico; a quotation from the old French commentator, Troplong, in *Garrozi* v. *Dastas,* 204 U. S. 64 (R. 13/15),

which was disapproved or distinguished in *Arnett* v. *Reade,* 220 U. S. 311, at 319 (see below); the dissenting opinion of Judge Stiles in *Brotton* v. *Langert,* 1 Wash. 73, 23 Pac. 688 (R. 32), in spite of which the Washington court adhered to the opinion of the majority and the Arizona court *reversed* its previous ruling to follow the better, correct, reasoning adopted in the State of Washington (see *Cosper* v. *Valley Bank,* 28 Ariz. 373, 237 Pac. 175); and an article by Prof. Evans in *35 Harvard Law Review 47* (R. 33) wherein the question here involved is not treated; and, finally, the case of *Stewart* v. *Stewart,* 199 Cal. 318 (R. 33), even although this Honorable Court distinctly held that the California doctrine that the wife has not a vested interest in the community property until the community is terminated by the death of the husband or by divorce, was not the law of Puerto Rico. *Arnett* v. *Reade, supra,* wherein speaking for this Honorable Court Mr. Justice Holmes said (pp. 319/320):

> The statement also directly contradicts the conception of the community system expressed in *Warburton* v. *White,* 176 U. S. 484, 494, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of community." And notwithstanding the citation in *Garrozi* v. *Dastas,* 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from *Warburton* v. *White.* See Garrozi *v.* Dastas, 204 U. S. 78. Los bienes que han marido y mujer que son de ambos por medio. Novisima Recopilación, Book 10, Title 4, Law 4.
>
> It is not necessary to go very deeply into the precise nature of the wife's interest during mar-

riage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc. 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferriere, Hist. du Droit Franc. 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words life *dominio*. See *United States* v. *Castillero*, 2 Black, 17, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilación, Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. *Garrozi* v. *Dastas*, 204 U. S. 64, 78.

Concerning the Commentaries of Manresa and Scaevola, the Circuit Court of Appeals says correctly (R. 44, italics inserted):

> * * * The appellant, however, refers to other passages from these writers which have more specific reference to obligations gratuitously assumed by the husband for accommodation of a third person, with no benefit accruing to the marital partnership, *and which seem to indicate that the community property would not be subject to attachment or execution on account of debts of that character.*

Those learned commentators hold:

> It is to be understood that in like manner as donations are prohibited, so also are releases, and

all dispositions without consideration (disposición a título lucrativo) by acts between persons in being. The payment of debts of a third person without any equivalent therefor, obligating himself gratuitously, forgiving him debts in whole or in part, loaning on condition that the loan be returned when and if it can be, etc., are acts without consideration that never can be understood to benefit the partnership. Direct or indirect gifts of ganancial property are, of course, prohibited, even although they be disguised under the forms of onerous contracts. (p. 581)

The husband, on the other hand, can only make gifts in accordance with the limited terms provided in Arts. 1409 and 1415, and he may have, even during the matrimony, obligations that relate to him alone (que le sean peculiares) in spite of the general expression of paragraph one of article 1408. (Section 1308 of Puerto Rico Code)

The consequences of these provisions and principles are:

1st.—That as a general rule, all obligations and debts contracted by the husband during the marriage are a liability of the conjugal partnership, insofar as such debts represent an equivalent received by the partnership, or by the husband who is presumed to always act in its name, or in the interest of said partnership. (p. 560)

9 Manresa, Comentarios al Código Civil Español (4th Ed., 1930).

Consequently only the debts contracted by the husband for the benefit of the family, for whose maintenance the conjugal partnership is by its very nature constituted, can in good logic with reference to the aforesaid be charged to the property of the conjugal partnership; therefore the provision in no. (1) of art. 1408 (Sec. 1308 of Puerto Rico Code)

might, without any inconvenience, be merged into no. (5), which charges the community property with the support of the family and the alimentation of the common children and the legitimate children of one of the spouses.

Support of the family, in this general meaning, must be understood to comprise everything which serves the increase of the community property—a most important point in this matter, which is not especially mentioned in the Code, and on which it seems appropriate to give some indications.

* * * * * * *

The rule is that all to which the husband is bound in favor of the partnership is binding on it, but it is not so when the obligation is for his own personal gain or that of his private property. (p. 247)

* * * If it happens that the guarantee given (by the husband) had for its object, directly or indirectly, the support of the family, in all the amplitude that we have heretofore given to this phrase, that is, procuring also the perception or conservation of the income or fruits that are destined (adscritos) for the purpose of the well being of the family, it is unquestionable that the gananciales shall respond to the obligation contracted, in case that the surety should have to be given effect, in which case the provision of law 61 De Toro would be followed, wherein it is permitted that the bond (surety) of a woman in favor of her husband shall be valid when the obligation contracted by the latter were one that had for its object the administration of ecclesiastical properties and the rents of the Crown. But, on the contrary, when the husband becomes a surety for a third party, without any possible benefit to the family, that is, for the sole consideration of his own interests, or of his relatives or friends, the situation becomes com-

pletely the reverse, the properties of the conjugal partnership not being liable in case of a proceeding against the husband as such surety. (pp. 248-49)

22 Scaevola, Codigo Civil (1905).

If this is the opinion of the outstanding commentators on the Spanish Civil Code, can there be any doubt as to what their view would be on the Puerto Rican Code in the light of the changes of 1902:

> Sp. 59, P. R. 159 (91)* and Sp. 1413, P. R. 1328 (1313), depriving the husband of the power to alienate or burden community real estate except with the consent of the wife;
>
> Sp. 60, P. R. 160 (92) and Sp. 61, P. R. 161 (93), giving the wife the right to purchase property, to manage and fully dispose of it and appear in court, none of which could she do under the Spanish code.

Concerning these and other changes in our Civil Code increasing women's right, the following language of the Supreme Court of Arizona is peculiarly applicable:

> Development of the community property law of the western states has gone hand in hand with the general emancipation of women from the economic bonds which have so long burdened them. While under the common law the husband and wife were "one", and he was always the "one", the world has of recent years gone a long way toward recognizing that even a married woman was a human being, with most of the rights of such, and that the status of marriage partook more of the nature of

* Number in parenthesis is that of the last, 1930, edition, the other is that of the 1902 edition which also appears in the Compilation of 1911.

> a partnership than that of master and servant, or guardian and ward. Naturally this movement has gone further in the newer states, whose institutions had not yet crystallized into form under archaic ideas of the subjection of the female sex, than in the older commonwealths, whose laws reflect the views of the generation which founded them. * * *
>
> It will readily be seen that we have placed ourselves squarely in accord with the view prevailing in the state of Washington, and this is but natural, for our statutes on this subject are more analogous to those of that state than to any other.
>
> *Cosper* v. *Valley Bank*, 28 Ariz. 373.

Vernier in his *American Family Laws*, Vol. III, pages 223/224, says:

> * * * Though the joinder of both spouses may be required in a conveyance of community real property, the husband may indirectly dispose of the same by charging it with his separate obligations. Though the wife may be conceded to have a present vested interest in community property, such interest may be seized and sold to satisfy obligations from which neither she nor the community derived any benefit. * * *
>
> * * * The Arizona and Washington rule goes a long way in the direction of equal rights, and is more consistent with the recognition that the wife has a present vested interest in community property. But it enables the husband without separate property to develop extensive community assets, yet to escape during marriage just contractual and tortious obligations.

All that the rule requires in order that the wife be fully protected is that her signature be obtained on any gratuitous obligation in like manner as it must be obtained

for a sale or mortgage of a real estate. Banks must simply be advised to add another line to the notes for the signature of the wife whenever a husband is accepted as accommodation endorser.

In only one State, Idaho, having a statute similar to those of Puerto Rico, Washington and Arizona, has it been held that the community property responds for a gratuitous obligation of the husband incurred without any benefit or intention to benefit the community. The decision to that effect is extremely short and shows that the matter was given very little consideration by the Court. We refer to *Holt* v. *Empey*, 32 Idaho 106, 178 Pac. 703, incidentally not cited by the Supreme Court of Puerto Rico, where all that was said on the subject is as follows (italics ours):

> It is contended that Rev. Codes Secs. 2686, as amended Sess. Laws 1913, c. 105, p. 425, prohibits the husband from selling, conveying or incumbering the community real estate, unless the wife join with him in executing the deed or other instrument by which the real estate is sold, conveyed or incumbered, and that, if the court should hold that the community property of husband and wife can be levied on by execution and sold to satisfy the separate debt of the husband, it would be allowing the husband to do indirectly what he cannot do directly, and would thus allow him to destroy the community by entering into collusion with a third party and signing separate obligations as surety as in the present case. No collusion, however, is alleged or shown.
>
> *It is generally held that community property is liable for the separate debts, obligations, and liabilities of the husband* (5 R.C.L. sec. 37, p. 858), though this rule does not prevail in Washington in respect of community real estate. (Here follows citations from Washington).

> We see no reason for *departing from this general rule.* Chapter 105 of Sess. Laws 1913, above referred to, does not expressly, nor even impliedly, oppose this holding, and the intention of the Legislature to except community property from liability for the husband's debts does not appear in the statute. We therefore hold that community real estate is liable to attachment and execution for the debts of the husband, whether incurred for his own use or for the benefit of the community.

The only authority cited in 5 R.C.L. 858 to support its statement as to the "general rule", is *MacDonald* v. *Badger,* 23 Cal. 393. We have shown how the California theory differs entirely from that of the other States having community property laws, and its disapproval by the Supreme Court of the United States.

In other early cases, as for instance *Villescas* v. *Ariz. Copper Co.,* 179 Pac. 963, later reversed by *Cosper* v. *Valley Bank, supra,* the decision was based on the similar statement in 21 Cyc. 1676, that

> The community property is in general also liable for the husband's separate debts.

in support of which the following cases were cited in note 13:

> *Schuyler* v. *Broughton,* 70 Cal. 282;
> *Davis* v. *Compton,* 13 La. Ann. 396;
> *Lee* v. *Hendrickson,* 75 Tex. 1900;
> *Cleveland* v. *Cole,* 65 Tex. 402, 12 S. W. 980; and
> *Cowan* v. *Nelson Mfg. Co.* (Tex.), 34 S. W. 1045.

The Louisiana decisions were based upon the ground that the husband had the right to alienate the community property without the consent of the wife and also, or in

consequence thereof, that she had only an eventual interest in the community, which she might never accept (*Davis* v. *Compton,* 13 La. Ann. 396).

As for the Texas decisions, they are based upon a statute entirely different from that of Puerto Rico as can be seen by a quotation from the early case of *Cleveland* v. *Cole, supra,* which in turn follows *Taylor* v. *Murphy,* 50 Texas 291, viz. (italics ours):

> It was held, under the laws as they existed before the passage of the Revised Statutes, that community property was *subject to the antenuptial debts of the wife,* (Taylor *v.* Murphy, 50 Tex. 291) and we think there is a stronger reason for holding such property subject to *like debts of the husband.* There has been some change of the language of the other statutes as incorporated into the new, but we think there is no substantial change intended.

But the Puerto Rican Code specifically provides that the debts contracted by the husband or by the wife, before marriage, shall *not* be borne by the partnership. If under the statutes of Texas such debts are payable from the community property, it might naturally follow that any and all debts contracted by the husband after the marriage would also be payable from such property. Note also that the trust or equitable title theory prevailing in Texas (35 Harvard Law Review, at 62) is entirely different to that adopted in Puerto Rico. Incidentally, in Texas and other States title to real property sometimes is taken and recorded in the name of the husband and at others in the name of the wife. Under the Mortgage Law of Puerto Rico such can never be the case. It must always appear in the deed and the record of Registry, whether the person who acquired the property is married and if so the name

of both the husband and wife. Thereupon the property is in effect recorded in the name of both spouses and it can not thereafter be transferred, encumbered or otherwise disposed of except with the signature of both.

In 31 C.J. 114, Section 1203, we also find the statement that

> * * * the general rule is that separate debts of the husband may be enforced against the community * * * (Note 40).

The first case cited, *Villescas* v. *Arizona Copper Co., supra,* has been overruled. Then follows the same California case cited in Cyc. and some others. Also *Holt* v. *Empey,* 34 Ida. 106, and *Davis* v. *Compton,* 13 La. Ann. 396, referred to above. Then two Philippine cases, *Staples-Howe Printing Co.* v. *Manila Bldg. etc. Assn.,* 36 Phil. 415, and *Joaquin* v. *Avellana,* 11 Phil. 249. In neither of these decisions does the origin of the husband's obligation appear. It may and probably was contracted for a good consideration and in connection with business which, if successful, would have been for the benefit of the community.

Besides *Cleveland* v. *Cole, supra,* and other Texas decisions, there is also cited the case of *Vivaldi* v. *Mariani,* 10 Puerto Rico 420, which undoubtedly, would have been cited by appellee's counsel and the Court, if it sustained the proposition of the text. Far from doing so, the Court used language which rather suggests that an obligation contracted by the husband without any consideration would not be a charge upon community property. The lower Court had held that a judgment obtained in a suit against a husband and his wife (the latter apparently was an unnecessary, if not an improper party defendant)

could not be satisfied from conjugal real estate, because Section 1328 of the code (now 1313) prohibits him from giving, selling or binding the real estate without the express consent of the wife (See p. 423 at foot). As to this, the Supreme Court held (p. 424 at top, italics ours):

> Such a construction of the statute has no place in the decision of this case, since the facts do not justify it, the court having found that the evidence introduced is not sufficient to demonstrate that the said obligations were contracted in fraud of the wife, nor does it show that there was no lawful consideration for the same. Of course, in any case where the evidence shows that the husband has been attempting to make use of the powers granted him over the property of the conjugal partnership, and the obligations placed upon the partnership property, by section 1323 of the Civil Code, to injure or imperil the rights of the wife therein, *the court would intervene to prevent the perpetration of a fraud, and set aside and abrogate any such obligation so contracted by the husband in fraud of the rights of the wife,* as it would in any other simulated contract or fraudulent conveyance.

We had reference above to the first words underscored, the others have been italicized to call attention to the fact that under the law of Puerto Rico *as interpreted by its Supreme Court* a present remedy will be given the wife to avoid or set aside any transactions made by the husband in fraud of her rights. This was apparently overlooked by Mr. Justice White in *Garrozi* v. *Dastas,* 204 U. S. at p. 81. Counsel also must have failed to call the learned Justice's attention to the provision of Section 7 of the Civil Code, viz.:

> When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs shall be taken into consideration.

which has been invoked by the Supreme Court of Puerto Rico in numerous cases to grant a remedy where none specifically is provided for in the code. See amongst others:

> *Sanchez* v. *Soto Nussa,* 14 DPR 442;
> *Totti* v. *Fernández,* 40 DPR 636, 641;
> *Ramirez* v. *Monroig,* 45 DPR 839;
> *McCormick* v. *Gonzales Martínez,* 49 DPR 473, 494;
> *Rodriguez* v. *Solivella & Co.,* 49 DPR 633, 637;
> *Hernández* v. *Ballester,* 49 DPR 869, 871.

Another statement of the Court in the *Vivaldi* v. *Mariani* decision has, we believe, considerable bearing on the question here at issue. Interpreting the very article relied upon by appellee, No. 1323, now 1308, providing that

> The conjugal partnership shall be liable for:
> 1. All the debts and obligations contracted during the marriage by the husband and also for those contracted by the wife in the cases in which she can legally bind the partnership.

the Court said, at page 422:

> The legislative intent in the enactment of a statute should be constantly kept in view in construing it, and it should not be defeated by a too strict adherence to the mere words used nor should an interpretation be adopted which leads to absurd

> consequences. (Sutherland on Statutory Construction, Sec. 215; Oates *v.* National Bank, 100 U. S. 239; Atkins *v.* Desintegrating Co., 85 U. S. 301 and 302; * * *.)

All that has been said, or can be said, to support the decision herein is that said Section 1323 (1308), as its predecessor 1408, literally provides that *all* debts contracted by the husband during the marriage shall be liabilities of the conjugal partnership. Such literal construction, we submit, is manifestly contrary to the legislative intent as shown by the elimination of, and amendments to, all of the other provisions of the code with respect to the power conferred to the husband over the property of the community as well as that of his wife,—("Paraphernal Property", Chapter IV, Tit. 3 of the Spanish Code (Arts. 1381 to 1391); also the simultaneous liberalizing in the wife's favor of the grounds for divorce (Sp. 105, P.R. 164, now 1930 Ed. 96).

The decisions of California, Louisiana and Texas are clearly distinguishable as pointed out by the Circuit Court of Appeals and, therefore, in the light of these overwhelming authorities and the unimpeachable logic of the amendments to the Puerto Rican Code that Honorable Court said:

> If we were to take a wholly independent view of the question at issue we should be moved by the fact that the tendency of development in community property law has been in the direction of an increasing protection of the wife's interest; the prejudice to the wife which results from the decision below would seem to be a retrogression.

POINT II

That the Circuit Court of Appeals erred in interpreting certain recent decisions of this Honorable Court to the effect that the right to appeal given by Congress from a judgment of the Supreme Court of Puerto Rico no longer exists.

Although the Circuit Court of Appeals in effect held that the judgment of the Supreme Court of Puerto Rico was clearly erroneous, yet it went on to say:

> * * * But we may not reverse a judgment of the Supreme Court of Puerto Rico on a matter of local law unless that judgment is "inescapably wrong." *Bonet* v. *The Texas Co.*, 60 Sup. Ct. 349 (Jan. 2, 1940); *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505; *Díaz* v. *Gonzalez*, 261 U. S. 102, 105.

And concluded its opinion as follows (R. 54):

> * * * As we pointed out in our opinion on the motion to dismiss, though Congress has given us appellate jurisdiction over the Supreme Court of Puerto Rico in matters of local law where the value in controversy exceeds $5,000, the exercise of this jurisdiction is so restricted by the canon prescribed by the Supreme Court of the United States that appeals in such cases are likely to be futile and merely to cause needless delay and expense.

In other words, the Circuit Court of Appeals believes that it has been virtually instructed by this Honorable Court that it cannot hereafter reverse the Supreme Court of Puerto Rico on a question of local law. Accordingly, the other day, June 4th, 1940, in *Trigo Marcus* v. *People of Puerto Rico*, the same court again said:

> * * * Certainly it cannot be said that the court was clearly, much less "inescapably" wrong. *Sancho Bonet, Treasurer* v. *Texas Co.*, 308 U. S. 463; *Díaz* v. *Gonzalez*, 261 U. S. 102.

Díaz v. *Gonzalez*, 261 U. S. 102, was by far not the earliest decision of this Honorable Court on the subject yet it has ever been cited as a, if not the, leading case on the subject, no doubt in consequence of the eloquent language of Mr. Justice Holmes at page 105, viz.:

> This court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299; *Nadal* v. *May*, 233 U. S. 447, 454, 58 L. ed. 1040, 1041. This is especially true in dealing with the decisions of a court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. In this case a slight difference in the caution felt in dealing with the interest of the minors (Baerga *v.* Registrar, 29 P.R.R. 440, 442), and a slight change of emphasis in the reading of statutes, explain the divergence between the supreme court and the circuit court of appeals. Our appellate jurisdiction is not given for the purpose of remodeling the Spanish-American law according to common-law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute

to these considerations led to our granting the writ of certiorari, and requires us to reverse the judgment below.

Unfortunately for those who are constrained to litigate their controversies in the Puerto Rican courts that eloquent statement of this high court simply ignores the facts. The learned judges of our Supreme Court have *not* been brought up in a different system—they have been educated in the United States of America and in deciding questions supposedly of civil law, the case at bar for instance, they do so *not* in accordance with the *Spanish* authorities (Manresa and Scaevola), but by reference to *American* decisions,—*Garrozi* v. *Dastas,* 204 U. S. 64, *Stewart* v. *Stewart,* 199 Cal. 318, and a dissenting opinion in *Brotton* v. *Langert,* 1 Wash. 73,—to sustain their illogical and manifestly erroneous conclusion. Where are the varying emphasis, tacit assumptions, unwritten practices or any influences gained from life that guided the Puerto Rican Court to ignore the greater freedom and more extensive rights granted to wives by the amendment to the Civil Code adopted by the new American or American-Puerto Rican Government, which succeeded that of Spain. But even if the Court had followed the different system in which it is supposed to have been brought up in, the Spanish, then according to the Spanish commentators Manresa and Scaevola, its decision should have been the other way.

As a matter of fact, in the *Díaz* case the Puerto Rican Court had reversed itself three times (see Petition for Writ, page 19) and therefore the Circuit Court of Appeals was only following that Court's knowledge of the local law as expressed *by it* in former opinions. The first ground upon which the writ was asked for and upon

which it well could have been issued and sustained was that (*idem*, p. 19):

> Contracts entered into on the faith of judicial interpretations of a statute which had not then been overruled cannot be impaired by a later change of such interpretations.
>
> *Gelpcke* v. *Dubuque*, 1 Wallace 175;
> *Muhlker* v. *Harlem Ry. Co.*, 197 U. S. 544.

The Supreme Court of Puerto Rico has to work under the severe handicap of having before it, for use by its five judges, only *one* copy of the record on appeal, and that a typewritten copy, also the briefs are filed in typewriting. A case after argument is turned over to a "ponente" who makes a draft of the opinion which is submitted to the other judges in conference months after the argument. It is not until then that the cases are decided, months and sometimes upwards of a year after the argument. This state of affairs is presumably known to the Congress. Anyhow the Congress in its good judgment has granted a right to appeal and that right, it is very respectfully submitted, should not be abrogated or whittled away by this most Honorable Court. But that is what this Honorable Court has virtually done in saying (italics inserted):

> We now repeat once more that admonition. And we add that *mere lip service* to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained

> here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be *inescapably wrong;* the decision must be *patently erroneous.*
>
> *Bonet* v. *Texas Co.,* 84 L. Ed. at 296.

This is a plea to reestablish the appellate jurisdiction granted by Congress. Even if this Honorable Court should conclude upon the hearing of this cause that the decision of the Supreme Court of Puerto Rico is not clearly erroneous and hence should be sustained, it is to the interest of due administration of justice, the giving effect of a law of our Congress, that this most Honorable Court clarify its recent language and explain just when, if at all, a decision of the Supreme Court of Puerto Rico can ever be held to be "inescapably wrong".

Conclusion

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reviewed by certiorari and in lieu thereof a judgment entered as would have been entered by the Circuit Court of Appeals had it considered itself at liberty to do so.

Luis Llorens Torres,
Luis Muñoz Morales, and
Henry G. Molina,
Counsel for Petitioner.

June 20, 1940.

FILED
AUG 6 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 186.

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Petitioner,

v.

THE NATIONAL CITY BANK OF NEW YORK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EARLE T. FIDDLER,
Attorney for Respondent.

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Opinion Below.

The opinion of the Circuit Court of Appeals (R. 41), reported in 110 F. (2d) 976, is correctly cited in the Brief in Support of Petition (p. 7).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code.

Statement of the Case.

Appellant is a judgment debtor on an obligation which bound him "as a several maker, not as a surety", using the language of the Circuit Court on a previous appeal. *De la Torre* v. *National City Bank of New York*, 91 F. (2d) 399, 403. To collect the judgment, real properties were attached which Petitioner claims belong to the community existing between himself and his wife, and not to his separate estate. Petitioner claims that his original obligation which formed the basis of the judgment was in reality an accommodation for one of his relatives, Mercedes de la Torre; that the community received no benefit therefrom nor did his wife consent to his original obligation; that therefore the community property is not bound to satisfy the judgment. It was on this statement of facts that the case went to the Supreme Court of Puerto Rico and the Circuit Court of Appeals.

The District Court had held that the facts above stated were not sufficient to bar the judgment creditor from attaching and selling the real property of the community to satisfy the judgment. The decision of the District Court was affirmed by unanimous decision of the Supreme Court, upon consideration of a fifty-five page brief filed on behalf of De la Torre (R. 9). Petitioner then filed a lengthy petition for rehearing with an additional memorandum which appear in the record on this Appeal, occupying pages 17 to 31 thereof, but the Supreme Court, again, unanimously, in an opinion fully reviewing the law a second time, denied the reconsideration prayed for (R. 31). The Circuit Court of Appeals affirmed the judgment of the Supreme Court of Puerto Rico (R. 41).

Question to Be Decided.

The question to be decided by this court is not whether the community real property may be attached and sold to satisfy the judgment, but whether the long line of decisions

of this Court, holding that the Supreme Court of Puerto Rico should be sustained in decisions involving solely local matters unless clearly wrong, denies a right of appeal created by Section 228 of the Judicial Code adopted by Congress (28 U. S. C. A. 225). (See Petition 4-5.)

Summary of Argument.

I. The judgment of the Circuit Court does not have the effect of denying a right of appeal.

II. The decision of the Circuit Court of Appeals does not overrule any decisions of the Supreme Court of Puerto Rico.

III. No question of general public interest is involved which would warrant review by this Court.

ARGUMENT.

FIRST.

The judgment of the Circuit Court does not have the effect of denying a right of appeal.

The petition for writ of certiorari questions and asks this Court to reverse its decision in *Bonet* v. *The Texas Co. (P. R.) Inc.*, —— U. S. ——; 84 L. Ed. 292, on the ground that that decision renders ineffectual Sec. 228 of the Judicial Code (28 U. S. C. A. 225) authorizing appeals in cases wherein the value in controversy exceeds $5,000.00.

This is not a case which falls within the range of circumstances which might possibly warrant a further review of the subject. Something, perhaps, could be argued for the advisability of such a review under some circumstances, for example, where the Supreme Court had patently disre-

garded the express language of a statute, or where the Supreme Court, in construing a local statute derived from continental sources, refused to follow American jurisprudence clearly established at the time the local Legislature had adopted the statute.

This case, however, is different. It is a *classic example* of the early application of the rule that the Supreme Court of Puerto Rico must be sustained unless "clearly" wrong.

The Supreme Court was interpreting its *Civil Code* derived from Spanish Sources on a question involving properties of husband and wife under the community system which is entirely foreign to the system known to the Common Law.

It has not violated principles of the Civil Law System. The most that can be said for the position of the petitioners is that the Supreme Court, after a very thorough consideration of the controversy, decided to follow one of two highly controverted theories which, as stated by Mr. Justice Holmes in *Arnett* v. *Reade*, 220 U. S. 311, 319-20, "has fed the flame of juridical controversy for many years". See Opinion of the Circuit Court (R. 46).

This Court, in effect, is requested to reverse the Supreme Court of Puerto Rico on the theory that "the tendency of development in community property law has been in the direction of an increasing protection of the wife's interest" (Opinion of the Circuit Court of Appeals (R. 13)) which might or might not be a salutary tendency. The Supreme Court of Puerto Rico decided in favor of one line of reasoning rather than another and is amply supported by authority in so doing (*Cf. Holt* v. *Empey*, 32 Idaho 106 and other cases and authorities discussed in the opinion of the Circuit Court (R. 52).

The Circuit Court (R. 53) quite properly concluded:

> "As was said in *Córdova* v. *Folgueras*, 227 U. S. 375, 378: 'The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal,

> and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong.' "

On the record it cannot be said that the decision of the Supreme Court of Puerto Rico is "wrong" at all, to say nothing of being "clearly wrong".

The right of appeal, therefore, has not been denied or prejudiced.

SECOND.

The decision of the Circuit Court of Appeals does not overrule any decisions of the Supreme Court of Puerto Rico.

No decision of the Supreme Court of Puerto Rico on the question before this Court which conflicts with the decision of the Supreme Court of Puerto Rico herein, has been cited, nor do we know of any such decision.

THIRD.

No question of general public interest is involved which would warrant review by this Court.

The question here litigated involves solely the question of property rights as between husband and wife.

Petitioner is asking this Court to reverse itself not only in holding (*Bonet* v. *The Texas Co. (P. R.) supra*) that a decision of the Supreme Court of Puerto Rico must be sustained unless "inescapably wrong", but also its holdings in earlier decisions that the Supreme Court of Puerto Rico must be sustained in matters involving its fundamental system of law derived from Civil Law sources, unless "clearly" wrong, *and in spite of the fact that the decision*

of the Supreme Court is amply supported by Spanish and American authorities. Regardless of any possible contention that the rule as stated in *Bonet* v. *The Texas Co. (P. R.)* should be subject to further review, on the theory that it goes too far in view of Section 228 of the Judicial Code, this is not a case in which the proposition contended for could be properly maintained, but a case which falls fully within the principles laid down in earlier undisputed cases.

CONCLUSION.

The decision of the Circuit Court of Appeals was in all respects correct and the Petition should be denied.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondent.

San Juan, Puerto Rico,
August 1, 1940.